

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)

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Annual Assessment of the Status of)
Competition in Markets for the)
Delivery of Video Programming)

CS Docket No. 99-230

COMMENTS OF ECHOSTAR SATELLITE CORPORATION

EchoStar Satellite Corporation ("EchoStar") hereby submits its Comments in response to the above-captioned Notice of Inquiry released by the Commission on June 23, 1999.

In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 99-230 (rel. June 23, 1999). The Notice requests comments on the status of competition in the markets for delivery of video programming.

EchoStar is a multichannel video programming distributor ("MVPD") providing Direct Broadcast Satellite ("DBS") service to subscribers throughout the United States. It currently operates four DBS satellites and soon plans to launch additional satellites. As of July 1999, EchoStar had over 2.6 million subscribers.

Effective competition has yet to arrive in the MVPD markets. Even though the increases in DBS subscribers have confirmed that DBS services are perhaps the only viable alternative to cable at this time, cable operators still dominate most MVPD markets. To EchoStar's knowledge, the increases in subscriber counts of the two DBS distributors have not been accompanied by corresponding decreases in the number of cable subscribers or by substantial erosion of cable market shares. In particular, cable operators preserve their stranglehold in urban areas. This continued dominance is largely due to unfair or unlawful

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advantages enjoyed by cable operators, including preferential access to cable and local broadcast programming. Unfortunately, the Commission has recently been remiss in tackling the substance of some of these problems. The Commission should refocus its efforts to foster effective competition in the MVPD markets, with an emphasis in four areas: access to the programming of cable-affiliated programmers; the increasing buying power of cable operators; access to the new cable broadband capabilities; and satellite retransmissions of network signals.

Moreover, for the Commission to tackle effectively the problems of the MVPD market, it is increasingly necessary to marshal and coordinate Commission resources that are currently dispersed in several Commission Bureaus. Specifically, the Commission should tap the expertise of the International Bureau on the needs, perspectives and special characteristics of satellite MVPD distributors. The MVPD market is no longer confined to cable operators, and indeed satellite technologies are essential to the promotion of effective competition in this market. The Commission should therefore increase the role of the International Bureau in all matters of MVPD competition.

Program Access. As of March 31, 1999, the Commission no longer has authority to regulate the rates charged by cable operators. 47 U.S.C. § 543(c)(4). This increases the importance of the Commission's duty to promote effective competition in the MVPD markets. Congress has given the Commission broad authority to achieve this goal, including the power to address anti-competitive behavior in the program access area. 47 U.S.C. § 548. In that respect, the Commission inquires whether its program access rules have been effective at promoting competition. Notice of Inquiry at ¶ 28. The answer is regrettably no, for the simple reason that the Cable Services Bureau has effectively abdicated its responsibility to enforce these rules. The Bureau has specifically been unwilling to adjudicate the merits of program access complaints

and has indeed appeared to go to extreme lengths to avoid having to do this. This reluctance ignores the “strong public policy that litigation be disposed of on the merits wherever possible.” *People ex rel. Dep’t of Conservation v. Triplett*, 55 Cal. Rptr. 2d 610, 620 (Cal. Ct. App. 1996).

To EchoStar’s knowledge, there has not been a single instance in the last year where the Commission has tackled the merits of a program access claim. In one instance, almost one year after EchoStar had filed a discrimination complaint against Fox Sports, the Bureau dismissed EchoStar’s discrimination claims on the ground that they were time-barred under the Commission’s rules. The claims had been filed within one year of an offer made by Fox Sports, and the Commission’s rules at the time clearly provided that a claim is timely if it is filed within one year from the date of an offer. The Bureau nonetheless held that a new offer does not restart the statute of limitations where there is an existing contract between the parties.¹ In an apparent attempt to legitimize that ruling after the fact, the Commission proceeded to change its rules without notice in a pending rulemaking proceeding.²

In another instance, the Commission denied EchoStar’s refusal-to-deal complaint against Speedvision without prejudice to its reinstatement after the end of contract litigation pending in a district court in Connecticut.³ As the Bureau itself recognized, this means that, at a

¹ See *EchoStar Communications Corporation v. Fox/Liberty Networks LLC et al.*, DA 99-1271 (rel. June 30, 1999) (“*Order on Reconsideration*”); *EchoStar Communications Corp. v. Fox Liberty Networks, et al.*, 13 FCC Rcd. 21841 (1998) (“*Memorandum Opinion and Order*”) (application for review pending).

² *In the Matter of 1998 Biennial Regulatory Review – Part 76 – Cable Television Service Pleading and Complaint Rules*, FCC 98-348 at ¶ 18 (rel. Jan. 8, 1999) (petition for reconsideration pending).

³ See *EchoStar Communications Corporation v. Speedvision Network, L.L.C. and Outdoor Life Network, L.L.C.*, DA 99-1148 (rel. June 14, 1999).

minimum, consumers will have to wait for years before being able to receive Speedvision's programming from EchoStar. *Id.*, ¶ 23. As reason for this long wait, the Bureau unquestioningly accepted Speedvision's claim that it had stopped providing its programming to EchoStar because of a contract dispute over packaging, even though all the evidence showed otherwise. *Id.* In fact, EchoStar had offered to distribute Speedvision's programming in accordance with Speedvision's interpretation.

Further, in dismissing complaints filed by EchoStar and DirecTV, the Bureau held that it had no jurisdiction over Comcast's refusal to provide these companies with its Philadelphia sports programming.⁴ The Bureau did not really explain how this ruling squares with the broad phrasing of the Act's unfair practices provision. 47 U.S.C. § 548(b). Under that rule, the programming being denied does not need to qualify as "satellite cable" programming if the unfair practice has the effect of inhibiting the distribution of another satellite cable product, as was the case here with EchoStar's attempt to sell its product to Philadelphia area subscribers. The Bureau did not adequately explain why it could not find an unfair practice in Comcast's refusal to deal, and in Comcast's transparent attempt to evade the specific prohibition on discrimination by transmitting its programming terrestrially.⁵

⁴ *In the Matter of DirecTV, Inc., Complainant, v. Comcast Corporation et al.*, 13 FCC Rcd. 21822 (1998); *In the Matter of EchoStar Communications Corporation, Complainant, v. Comcast Corporation*, 14 FCC Rcd. 2089 (1999).

⁵ *See also In the Matter of Dakota Telecom, Inc., Complainant, v. CBS Broadcasting, Inc.*, File No. CSR 5381-P 1999 (rel. July 1, 1999). In denying a program access complaint on jurisdictional grounds, the Bureau there noted that Congress intended the program access rules to be "transitional until the video programming distribution market becomes competitive." *Id.* at ¶ 2. This is of course true, but the transitional nature of those rules does not lessen the Bureau's obligation to enforce them until the market does become competitive.

In all those cases, the Bureau's reluctance to reach the merits has been compounded by the lack of any discovery in the program access proceedings, with the Bureau accepting at face value factual assertions of the cable entities that are on their face implausible and sometimes outlandish.

This record is unsatisfactory. By dismissing all of these claims on the basis of "technical defenses," the Bureau has ignored the "well established" policy of "strictly construing" such defenses "to avoid forfeiture of a plaintiff's rights."⁶ The Bureau has simply absented itself from enforcement of the 1992 Cable Act.

Access of MVPD distributors to programming is essential to effective competition. Programming costs are among the most significant expenses of an MVPD distributor. EchoStar, for example, pays many millions of dollars every month to cable-affiliated programmers. With the Commission not showing any interest in reaching the merits of program

⁶ See *People ex rel. Dep't of Conservation v. Triplett*, 55 Cal. Rptr. 2d 610, 620 (Cal. Ct. App. 1996) ("It is well established that [s]tatutorily imposed limitations on actions are technical defenses which should be strictly construed to avoid forfeiture of a plaintiff's rights.") (citations omitted). See also *Rasmussen v. Tuhn*, 561 N.W. 2d 43, 45 (Iowa 1997). ("When two interpretations [of a statute of limitations] are possible the preferred interpretation is the one that allows the litigant seeking relief to have a long period".) See *Person v. United States*, 27 F. Supp. 2d 317, 322 (D.R.I. 1998) ("A statute of limitations must be applied in such a manner that it provides a party a full opportunity to try his or her rights in court. In applying a new statute of limitations, a court must ensure that a party has notice of the new limitation and a reasonable time within which to commence suits on already existing causes of action, especially when the underlying claims allege constitutional defects or violations of federal law."); *Fred Meyer of Alaska, Inc. v. Adams*, 963 P.2d 1025, 1027 n. 2 (Alaska 1998) ("We look upon the defense of statute of limitations with disfavor and will strain neither the law nor the facts in its aid."); *Gentry v. Wallace*, 606 So. 2d 1117, 1122 (Miss. 1992) ("This Court views statutes of repose with disfavor, and if the statute is ambiguous, we place upon it a construction which favors the preservation of the plaintiff's cause of action."); *James v. Buck*, 727 P.2d 1136, 1138 (Idaho 1986) ("In addition, where two constructions of a statute of limitations or a rule which impacts directly upon such a statute are possible, courts generally prefer the construction which gives the longer period in which to prosecute the action.") (citations omitted).

access claims, it is widespread industry knowledge that cable operators pay substantially less, sometimes less than half of these amounts. The problem is even more stark in cases of complete lack of access to cable programming. For a car-racing fan who has a choice between EchoStar and his/her local cable operator, the choice is unfortunately simple: EchoStar cannot provide that fan with Speedvision's essential car-racing programming. Without vigorous enforcement of the program access rules, it is impossible to create a level playing field in the video markets.

Increasing Buying Power of Cable Operators. Even as the Commission has appeared unwilling to enforce the program access rules, the difficulties that satellite distributors face in obtaining fair, non-discriminatory access to programming reach farther than the scope of these rules, which cover only the conduct of *cable-affiliated* programmers. Based on their overwhelming buying power in the programming market, cable operators command discriminatory treatment at the expense of competing distributors from independent programmers as well. EchoStar's ability to compete against cable operators in the purchase of scarce programming is dwarfed by the millions of pairs of eyeballs that a large cable operator can offer a programmer, and its resulting leverage. This leverage is very real: in the few instances where they dare to speak to the issue, unaffiliated programmers admit that they are forced to offer cable operators below-market prices in order to obtain carriage.⁷ Indeed, even a

⁷ See e.g., Reply Comments of Lifetime Entertainment Services, IB Docket No. 95-168, 5 (filed Nov. 30, 1995) (arguing against application of the program access rules to independent programmers, as this would require them to offer below-market prices for all customers).

programming giant such as News Corp. has found it necessary to enter into exclusive arrangements in order to obtain carriage of new services.⁸

There is unfortunately much worse to come: the impending consolidation of the cable industry threatens to dramatically exacerbate this problem. For example, the proposed AT&T/MediaOne deal would create a behemoth serving many dozens of millions of subscribers. Since the availability of programming is key to the success of any MVPD product, and programming costs are among the most significant cost items faced by any distributor, this increase in cable operators' power in the programming market directly affects EchoStar's ability to compete with those operators in obtaining even independent programming.

To remedy the problems associated with the cable systems' growing market power in the programming market, the Commission must appropriately condition proposed mergers in the MVPD market. Such conditions should be aimed at reducing pressure (individual or collective) on independent programmers, as well as discrimination by affiliated programmers. At a minimum, these conditions should prohibit all exclusive arrangements between a cable operator and a programming vendor, irrespective of whether the vendor is vertically-integrated or independent.

Access to Cable Broadband Capabilities. The horizontal consolidation of the cable industry also threatens competition on another front: access to the broadband pipe to the

⁸ Consolidated Opposition and Reply Comments of the News Corporation Limited, File No. 106-SAT-AL-97, 7-8 (filed Oct. 9, 1997).

home. As parties to these deals have admitted, these transactions are the means for developing a nationwide *exclusive* broadband pipe to the home.⁹

Consumers in the MVPD marketplace increasingly demand broadband interactive services as an indispensable part of any MVPD offering. Indeed, as the Commission has recognized, “[t]he ability of all Americans to access . . . [broadband] networks, and to share in their resources, will very likely spur our growth and development as a nation.”¹⁰ EchoStar has tried to respond to consumers’ demands with its DISHPlayer service, but it is technically incapable of offering truly interactive products. DBS companies (which use the DBS downlink spectrum) do not have a return link from the home to the satellite and cannot at this point in time practically or reasonably duplicate the two-way cable pipe that will be created by recent mergers. Nor can DBS companies look elsewhere: alternative technologies for securing such access are not expected to be widely deployed in the near future. The only other incumbents with terrestrial communications facilities to the home (local telephone companies) have been extremely slow to deploy xDSL loops; even when they do, it is questionable whether they will be available to unaffiliated DBS distributors like EchoStar.

⁹ Indeed, the cable operators have touted the creation of this broadband facility as the main benefit of the consolidations: “the Merger Parties plan to be the first fully-integrated residential communications services provider with a national product, including the ability to provide long distance, video, local, wireless, Internet and other data services on a packaged, as well as individualized basis.” AT&T and TCI Applications for Proposed Transfers of Control, 39 (filed Sept. 14, 1998).

¹⁰ *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, CC Docket No. 98-147, ¶ 7 (rel. Aug. 7, 1998) (“*Advanced Services Order*”).

In short, in the current MVPD market, the proposed cable mergers will enable cable operators to control the *only* broadband conduit to and from the home. With control over that conduit, cable operators will, in turn, be able to package the cable programming that is distributed by EchoStar with complementary interactive products that only they can provide. In other words, the broadband pipe has become an essential facility, and, without access to it, DBS companies will be unable to compete. The result: higher prices and fewer choices for consumers.

Such an anti-competitive outcome can be readily avoided. For its part, EchoStar is prepared to pay a reasonable price for access to the broadband network and believes that it can seamlessly integrate the interactive capabilities of the broadband cable pipe into its satellite product. This can be technically achieved in non-intrusive ways that do not hamper the cable operators' ability to provide their own planned broadband services. The only thing that stands between EchoStar and the broadband market – and thus effective competition in this market -- is the willingness of those who control the broadband bottleneck resource to negotiate. Accordingly, the Commission should demand from merger applicants a commitment to make the broadband network available to MVPD distributors for the purpose of complementing their own MVPD offerings on reasonable terms to be negotiated by the parties and prescribed by the Commission upon a failure to agree.

Network Signals. Another essential prerequisite to satellite distributors' ability to compete is their access to network signals on non-discriminatory terms compared to those available to cable operators. As the Commission is well aware, most consumers who walk away from the store without buying a satellite dish do so because of the lack of local network signals

in a satellite MVPD offering.¹¹ This decisive handicap arises from the restrictions embedded in the current compulsory copyright license for satellite distributors, compared to the much broader cable compulsory license. Congress is in the process of considering legislation that would eliminate many of these disparities. Under that legislation, the Commission will likely be called upon to make several key determinations and implement critical aspects of the law. Among other things, it will likely fall to the Commission to avert discriminatory retransmission deals that may otherwise perpetuate the unfair competitive advantage currently enjoyed by incumbent MVPD distributors. In short, the Commission will likely be given the statutory tools to combat a competitive problem that it has for a long time recognized, and in turn the effectiveness of the new legislation at promoting effective competition will greatly depend on the Commission's implementation.

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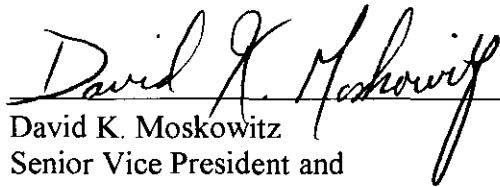
Counsel for EchoStar Satellite Corporation

Dated: August 6, 1999

¹¹ *In the Matter of: Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act; Part 73 Definition and Measurement of Signals of Grade B Intensity*, 14 FCC Rcd. 2654, ¶ 94 (1999); *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd. 24284, ¶ 63 (1998).

DECLARATION

I, David K. Moskowitz, hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.



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CERTIFICATE OF SERVICE

I, Colleen Sechrest, hereby declare that I have this 6th day of August, 1999, caused copies of the foregoing to be sent by messenger (indicated by *) or first-class mail to the following:

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